

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DEVAL DENIZCILIK VE TIGARET A.S.,

Plaintiff,

06 Civ. 15329 (MGC)

- against -

OPINION

AGENZIA TRIPCOVICH S.R.L. and BANCA
POPOLARE DI MILANO,

Defendants.

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APPEARANCES:

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By: Thomas M. Gandolfo, Esq.

Cedarbaum, J.

Deval Denizcilik Ve Tigaret A.S. ("Deval") sues defendant Agenzia Tripovich S.R.L. ("Tripovich") for confirmation of a London arbitration award and defendant Banca Popolare di Milano ("BPDM") for breach of a guarantee. Shortly after filing the complaint, Deval obtained an *ex parte* order for attachment of wire transfers routed through New York banks. BPDM now moves to vacate the attachment and dismiss the complaint as against it on the ground that there is no subject matter jurisdiction because the breach of guarantee claim is not within the admiralty jurisdiction of the court, and there is no other basis for federal jurisdiction.

BACKGROUND

The following facts are undisputed.

Plaintiff Deval, a Turkish corporation with its principal place of business in Istanbul, Turkey, is in the business of leasing cargo ships. On February 20, 1997, Deval entered into a charter party with defendant Tripovich, an Italian corporation with its principal place of business in Trieste, Italy, pursuant to which the Leyla Deval, a ship owned by Deval, was chartered by Tripovich to carry general cargo from

Porto Nogaro, Italy to Alexandria, Egypt. Defendant BPDM, an Italian bank with its principal place of business in Milan, Italy, was not a party to that agreement.

While at the load port of Porto Nogaro, the Leyla Deval ran aground. As a result, certain disputes arose between Deval and Tripcovich. To prevent Deval from exercising a maritime lien against the cargo on board the vessel, Tripcovich supplied Deval with a document entitled "GUARANTEE NO. FCE 35613 M.V. 'LEYLA DEVAL' C/P DD PIRAEUS 20.02.1997 GROUNDING AT P. NOGARO" ("the guarantee") (Compl., Ex. 2). The guarantee, issued by the Mestre, Italy branch of BPDM on March 24, 1997, provides, in relevant part:

In consideration of and upon condition that you refrain from exercising a lien on the cargo, we BANCA POPOLARE DI MILANO S.C.A. R.L. Mestre Branch, hereby undertake to pay you on your written demand any sum which may be adjudged to be due to you by the Charterers of the vessel "Leyla Deval," Messrs. Agenzia Tripcovich Srl, as a consequence of the above claim either by friendly written agreement between the parties and/or enforceable judgment by the competent judicial authority and/or arbitration award, provided such sum will not exceed US\$ 100,000 (one hundred thousand only).

(Id.) Deval accepted the guarantee and refrained from exercising a lien on the cargo.

Although the charter party provides for arbitration in London, Deval and Tripcovich tried their dispute before an

Italian court in Trieste. After the Trieste court absolved Tripovich of liability, however, Deval demanded that the parties submit the same dispute to arbitration in London. Tripovich refused. Nevertheless, on April 23, 2004, a justice of the English High Court appointed an arbitrator to hear Deval's claim. Tripovich chose not to participate in the proceedings and did not submit any defense. On November 28, 2005, the arbitrator issued a "Final Award" against Tripovich - an award which Tripovich has not paid. The complaint alleges that the amount Tripovich owes is \$344,377.65.

On October 4, 2006, counsel for Deval presented BPDM with the London arbitration award and demanded payment under the guarantee. BPDM refused, arguing that the award is unenforceable because the doctrine of *res judicata* barred Deval from arbitrating a claim previously litigated in Italy.

Deval responded by filing this action, in which it sues Tripovich for confirmation of the arbitration award and asserts a claim against BPDM for breach of the guarantee. After meeting the minimal burden imposed upon it by Rule B of the Supplemental Rules for Admiralty or Maritime Claims, Deval obtained an *ex parte* order, directed to a number of banks in the Southern District of New York, directing the attachment of up to \$344,377.65 of Tripovich's funds, and a similar *ex parte* order directing the attachment of up to \$100,000 of BPDM's

funds. Shortly thereafter, Deval attached \$100,000 belonging to BPDM as those funds were traveling through a New York bank.

BPDM now moves to vacate the order of attachment and dismiss the complaint as against it on the ground that this court has no subject matter jurisdiction over Deval's claim for breach of the guarantee.

DISCUSSION

"A party seeking to invoke the subject matter jurisdiction of a court has the burden of demonstrating that there is subject matter jurisdiction in the case." Shenandoah v. Halbritter, 366 F.3d 89, 91 (2d Cir. 2004). Deval argues that its claim against BPDM falls within this court's admiralty jurisdiction because the guarantee upon which it sues is a "maritime contract."

Federal district courts have original jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction" 28 U.S.C. § 1333(1). It is well settled that "this grant includes jurisdiction 'over all contracts . . . which relate to the navigation, business, or commerce of the sea.'" Atlantic Mutual Insurance Co. v. Balfour Maclaine International Ltd., 968 F.2d 196, 199 (2d Cir. 1992) (quoting DeLovio v. Boit, 7 F.Cas 418, 444 (C.C.D. Mass. 1815) (No. 3,776) (Story, J.)).

However, the line separating maritime contracts from nonmaritime contracts is not always easy to draw. See Norfolk Southern Railway Co. v. Kirby, 543 U.S. 14, 23, 125 S.Ct. 385, 393 (2004); CTI-Container Leasing Corp. v. Oceanic Operations Corp., 682 F.2d 377, 379 (2d Cir. 1982) ("The precise categorization of the contracts that warrant invocation of the federal courts' admiralty jurisdiction has proven particularly elusive.").

In determining whether a contract is a maritime contract, the focus of the inquiry is not on the name assigned to it but rather on the "the nature of the services" and "the character of work" to be performed. Ingersoll Milling Machine Co. v. M/V Bodena, 829 F.2d 293, 302 (2d Cir. 1987). The Supreme Court has instructed that "[t]he principle by reference to which the cases are supposed to fall on one side of the line or the other is an exceedingly broad one. The only question is whether the transaction relates to ships and vessels, masters and mariners, as the agents of commerce." Kossick v. United Fruit Co., 365 U.S. 731, 736, 81 S.Ct. 886, 890 (1961) (internal quotation marks and citation omitted). Thus, the Second Circuit has held that "[i]f the subject matter of the contract relates to a ship in its use as such, or to commerce or to navigation on navigable waters, or to transportation by sea or to maritime employment it is fairly said to constitute a maritime

contract.” Ingersoll, 829 F.2d at 302 (internal quotation marks and citation omitted).

BPDM argues that Deval’s claim against it is not cognizable in admiralty because the guarantee upon which Deval sues is not a maritime contract. It points out that no maritime services were to be performed by BPDM, nor was BPDM to receive such services, nor did BPDM become a party to the underlying charter party or assume the obligations of Tripovich when it issued the guarantee. Instead, BPDM characterizes the guarantee as a promise to pay up to \$100,000 should an enforceable judgment or award be issued against a particular bank customer. According to BPDM, the subject matter of the guarantee is BPDM’s obligation to pay damages, and the fact that the bank customer happened to be a ship charterer does not render the guarantee a maritime contract.

In support of this argument, BPDM relies on Fednav, Ltd. v. Isoramar, S.A., 925 F.2d 599 (2d Cir. 1991). In Fednav, an assignee of a subrogated marine underwriter sued the lessee of a ship after a shipment of steel was damaged on its way from Germany to Chicago. Id. at 600. After the lessee settled the claim for \$5,000, the shipowner allegedly agreed to contribute 50 percent of the settlement and 50 percent of the lessee’s legal fees. Id. When the shipowner failed to pay, the lessee

sued. Id. The question before the court was whether the shipowner's promise to contribute was a maritime contract.

The court held that it was not. While a charter party is a maritime contract, "merely agreeing as a surety to pay damages for another's breach of a maritime charter is not a maritime contract." Id. at 601 (internal quotation marks and citation omitted). This is because

the direct subject-matter of the suit is the covenant to pay such damages, which neither involves maritime services nor maritime transactions; and . . . the mere fact that the event and measure of liability are referable to the charter party does not make the [agreement to pay] a maritime contract, nor make its obligation maritime in a jurisdictional sense.

Id. (quoting Pacific Surety Co. v. Leatham & Smith Towing & Wrecking Co., 151 F. 440 (7th Cir. 1907)). After describing the subject matter of the shipowner's agreement as a "promise to contribute to the settlement of the cargo dispute," the court held that the agreement was "not maritime in nature because it involves neither maritime services nor maritime transactions." Id. at 601-602.

According to BPDM, Fednav compels the conclusion that Deval's claim for breach of the guarantee is not cognizable in admiralty. But Fednav is distinguishable in a crucial respect. BPDM did not merely promise to pay money should Tripovich be

held liable. Rather, it promised to pay money *in order to prevent Deval from exercising a maritime lien* upon cargo belonging to Tripovich. In other words, the guarantee was issued as a substitute for the cargo. The terms of the guarantee reflect this fact. (Compl., Ex. 2) ("In consideration of and upon condition that you refrain from exercising a lien on the cargo, we . . . hereby undertake to pay you . . ."). And counsel for BPDM confirmed it at oral argument. (Hr'g Tr. 10, June 21, 2007) ("The bank was clearly aware that the reason it was asked to issue its personal promise based on its net worth was because the cargo was going to be moved off ship.").

BPDM issued the guarantee in order to free Tripovich's cargo from the threat of a maritime lien. Tripovich's cargo would not have been released had BPDM not issued the guarantee. BPDM's guarantee, which ultimately hastened the delivery of the cargo by sea, is not merely a contract to contribute to the settlement of a maritime claim; rather, it is a contract whose purpose is directly traceable to the presence of cargo onboard a seagoing vessel. Thus, the subject matter of the guarantee is related to "commerce . . . on navigable waters" and "transportation by sea." Ingersoll, 829 F.2d at 302. The guarantee is therefore a maritime contract.

CONCLUSION

For the foregoing reasons, BPDM's motion to vacate the order of attachment and dismiss Deval's complaint for lack of subject matter jurisdiction is denied.

SO ORDERED.

Dated: New York, New York
September 28, 2007

S/ _____
MIRIAM GOLDMAN CEDARBAUM
United States District Judge